IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 918

BREWERY & BEVERAGE DRIVERS, WAREHOUSEMEN & HELPERS UNION, LOCAL NO. 993, JOSEPH A. WAGNER and WADE RUSSELL,

Petitioners,

vs

McLEAN DISTRIBUTING COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Supreme Court of Minnesota

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To the Supreme Court of Minnesota

Respondent, McLean Distributing Company, Inc., contends that the decision of the Minnesota Supreme Court is correct and is in accord with the applicable decisions of this Court. It therefore prays that this Court deny the Union's petition for a Writ of Certiorari to review the order and judgment of the Minnesota Supreme Court which granted to respondent a peremptory Writ of Mandamus.

OPINIONS BELOW

The Trial Court's decision consists of findings of fact and conclusions of law, without opinion, and is properly set forth in Appendix A of the union's petition, pp. 14-17. The opinion of the Minnesota Supreme Court is reported in 94 N. W. 2d 514 (1959), and is properly[1] reprinted as Appendix B of the union's petition, pp. 18-43.

JURISDICTION

Respondent concedes that the judgment of the Minnesota Supreme Court granting respondent a Writ of Mandamus is final for the purpose of review by this Court under 28 U.S.C. Section 1257(3). *Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U. S. 564, 571, 36 S. Ct. 424, 427, 60 L. Ed. 802; *Davies v. Corbin*, 112 U. S. 36, 40, 5 S. Ct. 4, 28 L. Ed. 627,629; *McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869; *American Express Co. v. Michigan*, 177 U. S. 404, 406, 20 S. Ct. 695, 44 L. Ed. 823, 824; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. Ed. 271, 273.

[1]Several inadvertent errors of the Minnesota Supreme Court appear in its decision. In 94 N.W. 2d 514, at 521, footnote 8, the Court quoted the last sentence, instead of the two preceding sentences which were cited to it by respondent, of footnote 2 of the opinion of this Court in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 437, 444, 75 S. Ct. 489, 492, 99 L. Ed. 510, 516. Also, in 94 N.W. 2d 514, at 522, the Minnesota Supreme Court stated that a violation by the union of Section 8(d) of the Act, 61 Stat. 142, 29 U.S.C.A. Section 158(d), would be an "unfair labor practice under Section 8(b)(2);" actually, such violation would be an unfair labor practice under Section 8(b)(3) of the Act, not Section 8(b)(2).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are as follows:

1. 61 Stat. 140, 29 U.S.C. Section 157 (Section 7 of the Act)
2. 61 Stat. 140, 29 U.S.C. Section 158(b)(3) (Section 8 (b)(3) of the Act)
3. 61 Stat. 140, 29 U.S.C. Section 158(d) (Section 8(d) of the Act)
4. 61 Stat. 151, 29 U.S.C. Section 163 (Section 13 of the Act)
5. 61 Stat. 156, 29 U.S.C. Section 185(a) (Section 301 (a) of the Act)

These statutes are set forth as Appendix A to this brief, infra, pp. 25, 26, 27.

The pertinent provisions of the Minnesota Labor Relations Act are properly set forth in the union's petition, Appendix D, pp. 48-49 thereof.

QUESTION PRESENTED

The single question involved in this case is as follows:

Does a state court have jurisdiction to regulate by state law a strike affecting interstate commerce when the strike and picketing is in violation of a no-strike clause in a collective bargaining agreement and constitutes conduct which is neither protected nor prohibited by the National Labor Relations Act?

STATEMENT OF THE CASE

Respondent is in no substantial disagreement with the statement of the case by the union (Petition, pp. 4-7), but for the sake of brevity, as well as completeness, respondent respectfully submits that the statement of the facts in the opinion of the Minnesota Supreme Court, 94 N. W. 2d 514, 515-518, is a full and satisfactory presentation of the facts involved herein. The facts thus stated also appear in the union's petition, pp. 18-24, where the Minnesota Supreme Court's opinion is reprinted.

ARGUMENT

The union's statement of the reasons why this Court should grant the Writ (Petition, pp. 8-12), as well as its attempt at framing the legal issues involved (Petition, p. 3), demonstrates the correctness of the statement of the Minnesota Supreme Court in its opinion below, 94 N. W. 2d 514, at 519, where the Court observed:

> "It seems to us that much of the difficulty in this case arises from the refusal of respondent union to face the real issue before us. * * *"

However, the union does in fact recognize what the actual decision of the Minnesota Supreme Court was, for the union states on page 9 of its petition:

> "The issue directly involved in this case is one not heretofore determined by this Court; i.e., the power of a state court to enjoin a supposed breach of a collective bargaining contract. * * *"

In this connection, the opinion of the Minnesota Supreme Court is very specific as to the precise holding involved herein. The Court stated (94 N. W. 2d 514, at 526):

"No attempt has been made in this opinion to review the many cases dealing generally with the extent to which a state court may go in granting relief in a case involving a labor controversy in the field of interstate commerce. Instead, the decision is limited to the single question involved, namely, whether, *on the record before us*, the courts of this state may grant injunctive relief to restrain a strike in violation of a no-strike clause in a collective-bargaining contract which contains no provisions for reopening or negotiation prior to its expiration. We have not attempted to pass on the question of whether the state courts have concurrent jurisdiction under §301 of the Labor Management Relations Act (29 U.S.C.A. §185). As far as the record before us is concerned, we do not believe that the relief sought here is within the contemplation of §301. * * *" (Emphasis in original)

In view of the precise holding of the Minnesota Supreme Court, and the union's admission that the "issue directly involved in this case" is the power of a state court to enjoin a breach of a collective bargaining contract, respondent respectfully submits that the question before this Court is correctly stated by respondent on page 3, *supra*.[2]

It is the respondent's contention that the decision of the Minnesota Supreme Court is correct and is fully in accord,

[2]The assertion that the Minnesota Supreme Court decided the separate bargaining unit issue as raised below by the union is without merit. Refusing to apply to the National Labor Relations Board for a separate unit determination (T. 29), the union sought to avoid a finding that it breached its contract by asserting that the striking employees were not covered by the contract at all but constituted a separate bargaining unit. (T. 93-94, 105-106, 148) This claim, of course, was insufficient to preclude the Court from deciding that the new employees "were hired under the contract, they were bound by it, and it must follow that the strike was in violation of the terms of an express contract." 94 N.W. 2d 514 at 526.

with the applicable decisions of this Court. This is because Congress, the United States Supreme Court, and the National Labor Relations Board have clearly determined:

(1) That a strike in violation of a collective bargaining contract is not protected concerted activity within the meaning of Sections 7 and 13 of the National Labor Relations Act;

(2) That a strike in violation of a collective bargaining contract is not prohibited as an unfair labor practice by Section 8 of the Act;

(3) That the National Labor Relations Board is not the proper forum to grant remedies for such violations.

In the face of such subsequently demonstrated "compelling precedent applied to essentially undisputed facts," it is certainly permissible for the Minnesota Supreme Court, as it is for this Court, to decide whether the union conduct here involved is subject to state jurisdiction without awaiting a determination of the Board in the first instance. *San Diego Building Trades Council v. Garmon*, — U. S. —, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775, 784.

1. The union has claimed on page 9 of its petition that the strike and picketing in violation of its contract would be protected by Section 7 of the National Labor Relations Act. This is demonstrably not the case. This Court, in *NLRB v. Sands Mfg. Co.*, 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, dealt with a situation where employees had demanded the right to negotiate changes in an existing collective bargaining agreement. When the company refused to make the changes requested, the employees concertedly refused to work and they were thereupon discharged and replaced. This Court stated (306 U. S. 344, 59 S. Ct. 514):

> "• • • Respondent rightly understood that the men were irrevocably committed not to work in accordance

> with their contract. It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places. The Act does not prohibit an effective discharge for repudiation by the employe of his agreement any more than it prohibits such discharge for a tort committed against the employer."

In commenting upon the *Sands* case, in *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 U. S. 245, 259-260, 69 S. Ct. 516, 524, 93 L. Ed. 651, this Court said that the language of Sections 7 and 13 of the National Labor Relations Act did not make legal a strike "in violation of a contract." This declaration was also recognized by Mr. Justice Murphy in his dissenting opinion, 336 U. S. 269, 69 S. Ct. 527, where he stated, citing the *Sands* case, that:

> "We have recognized that the phrase 'concerted activities' does not make every union activity a federal right. We have held that * * * a strike in violation of a contract * * * must be withdrawn from the literal language of Sec. 7."

Furthermore, in its opinion in the *International Union, U.A.W. v. Wisconsin Employment Relations Board* case, *supra*, the Court discussed at length a union contention therein that concerted work stoppages were protected activities under Section 7 and Section 13 of the Act. In holding that Congress had not protected the union conduct which state law had forbidden, and therefore that the conduct was governable by the state or was entirely ungoverned, this Court specifically adverted, 336 U. S. 260, 69 S. Ct. 525, to the report of the House Committee of Conference handling the bill which became the Taft-Hartley Act, H. R. Rep. No.

510, 80th Cong., 1st Sess., p. 38. That report contained the following statements (*ibid.*, p. 15):

> "Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. * * * *Again, in the Scullin Steel case* (65 NLRB 1294) *and in the Dyson case* [72 NLRB 445] *the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the Act,* and refused to reinstate employees discharged for engaging in such activities. * * *
>
> "By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and *violation of collective bargaining agreements* from the protection of Sec. 7 were unnecessary." (Emphasis supplied.)

The decisions of the National Labor Relations Board which hold that a strike in violation of an express or implied no-strike clause is a breach of contract and constitutes unprotected activity are clear and convincing. See *American Gilsonite Co.*, 121 NLRB No. 193; *Mid-West Metallic Products, Inc.*, 121 NLRB No. 164; *W. L. Mead, Inc.*, 113 NLRB 1040; *Armstrong Cork Co.*, 112 NLRB 1420; *California Cotton Cooperative Ass'n, Ltd.*, 110 NLRB 1494; *Michigan Lumber Fabricators, Inc.*, 111 NLRB 579; *Wagner Electric Corp.*, 105 NLRB 1; *Cities Service Refining Corp.*, 105 NLRB 797; *Stockham Pipe Fittings Co.*, 84 NLRB 629; *United Elastic Corp.*, 84 NLRB 768.

The reasoning of the Board is well illustrated in *W. L. Mead, Inc.*, 113 NLRB 1040, 1043, where the Board declared:

> "Every encouragement should be given to the making and enforcement of such clauses. But, if employees may

effectively call upon the Board to protect them when they arbitrarily breach clear and binding arbitration clauses of this kind, and turn to the use of economic force for the settlement of grievances rather than to the contractual, quasi-judicial procedure, the effect will be to discourage the making of and the adherence to, contractual arbitration procedures. To hold that a strike in furtherance of such a material breach of a clear and binding contractual arbitration clause is to be protected by this Board would be contrary to the labor policy embodied in the National Labor Relations Act as interpreted by the Courts of Appeals and the Supreme Court." (Citations omitted)

The *Mead* decision of the Board was noted with approval by Chief Judge Magruder in a parallel proceeding arising out of the very same controversy. See *Teamsters, Local* 25 *v. W. L. Mead, Inc.*, 236 F. 2d 576 (1st Cir.), *cert. den.* 352 U. S. 802, 77 S. Ct. 21, 1 L. Ed. 2d 37.

See also *United Construction Workers v. Haislip Baking Co.*, 223 F. 2d 872 (4th Cir.), *cert. den.*, 350 U. S. 847, 76 S. Ct. 87, 100 L. Ed. 754; *NLRB v. Dorsey Trailers, Inc.*, 179 F. 2d 589 (5th Cir.).

With respect to the union's reliance upon *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270, 76 S. Ct. 349, 100 L. Ed. 309, (Petition, p. 11), see *Mid-West Metallic Products, Inc.*, 121 NLRB No. 164.

2-3. Notwithstanding the fact that the union declares it has not violated any provision of the National Labor Relations Act (Petition, p. 11), the union suggests that if its conduct is not protected it "would appear to be prohibited under Section 8(d)(4)", which conduct would then be an unfair labor practice on its part under Section 8(b)(3) of the Act (Petition, p. 9). As stated before, the Minnesota Supreme Court found that the new employees were

hired under the contract and their strike was in violation of the express terms thereof. 94 N. W. 2d 514, 526.

It is clear from the legislative history of the Taft-Hartley Act and from the decisions of this Court and the National Labor Relations Board that a violation of a collective bargaining agreement is not prohibited as an unfair labor practice under the National Labor Relations Act.

The House of Representatives Conference Report, 80th Cong., 1st Sess., submitted by Mr. Hartley from the Conference Committee, states on pp. 41-42:[3]

> "The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. *Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board.*" (Emphasis supplied)

This Court, in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, 443 n. 2, 75 S. Ct. 489, 491 n. 2, 99 L. Ed. 510, stated:

> "• • • It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' H. R. Conf. Report 510, 80th Cong., 1st Sess., p. 42. • • •"

[3] 1 Legislative History of the Labor Management Relations Act, 1947, pp. 545-546.

Furthermore, the National Labor Relations Board has historically adopted the position that the Board is not the proper forum for the enforcement of collective bargaining agreements, and that their violation does not constitute an unfair labor practice within the purview of the Board's jurisdiction.

Thus, in *United Telephone Company of the West and International Brotherhood of Electrical Workers, Local No. 343 AFL*, 112 NLRB 779, 781, the Board said:

> "* * * Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '* * * it will not effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contract constitute unfair labor practices under the Act.' (Citing cases)
>
> "Nor do we find merit in the contention that the Respondents' failure to arbitrate this dispute constituted a refusal to bargain within the meaning of the Act. The possibility of arbitration was still under consideration when the negotiations were terminated after the Union filed charges with the Board. In any event, the Board does not hold that a failure to arbitrate a dispute is in itself a refusal to bargain in violation of the Act. (Citing cases)
>
> "In view of its contractual relations with the Respondents, the Union's recourse in this situation was to exhaust the possibility of settling the overtime question by negotiation, and, failing such settlement, to seek judicial enforcement of its construction of the contract. *The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.*" (Emphasis supplied)

The Board then cites and quotes from *Association of Salaried Employees v. Westinghouse Electric Corporation*, *supra*, where this Court stated:

"* * * It is significant, however, that breach of contract is not an 'unfair labor practice.'"

In *Textron Puerto Rico and Textile Workers Union Local 24, 877, ILA-AFL*, 107 NLRB 563, 584, the Board said:

"* * * Thus, the record establishes, at the most, that the Respondent refused to comply with the Union's request that the Respondent submit to arbitration the dispute arising out of that discharge. *Whether or not such refusal constituted a breach of the collective-bargaining agreement, it did not, in itself, constitute a violation of Section* 8(a)(5) *and* (1) *of the Act. Accordingly, we shall dismiss the complaint.*" (Emphasis supplied)

In *Crown Zellerbach Corporation*, 85 NLRB 753, 754, the Board stated:

"The stability of labor relations which the statute seeks to accomplish * * * depends upon the channelization of the collective bargaining relationship within the procedures of a collective bargaining agreement. By encouraging utilization of such procedures in this case, we believe the statutory policy will best be effectuated. *Affirmative Board action would on the other hand put the Board in the position of policing collective bargaining agreements, a role we are unwilling to assume.*" (Emphasis supplied)

In *Perry Norvell Company*, 80 NLRB 225, 240, the Board, after referring to the legislative history of the Taft-Hartley Act previously quoted, stated:

"From this we also conclude that Congress did not intend to make a strike in breach of a contract an unfair labor practice *per se*." (Emphasis in original)

It is interesting to observe that in two recent decisions the Board attempted to change its opinion and to hold that where the grievance and arbitration provisions of a contract required bargaining during the course of the contract the refusal of one or the other parties to so bargain constituted "bad faith bargaining" which was proscribed by Sections 8(b)(3) and 8(a)(5) of the Act as an unfair labor practice. This, of course, was only where the strike occurred "in a bargaining context." See *International Union, U.M.W., Local No.* 9735 *and Westmoreland Coal Company*, 117 NLRB 1072; and *International Union, U.M.W., Local No.* 2935 *and Boone County Coal Corporation*, 117 NLRB 1095.

In each of these cases the Board has been overruled by the appropriate Court of Appeals. Thus in the *Boone County* case, *supra*, the Court of Appeals for the District of Columbia in *International Union, United Mine Workers of America v. National Labor Relations Board*, 257 F. 2d 211, held that the Board was not justified in treating a violation of a collective bargaining contract as an unfair labor practice. This decision on June 12, 1958, quoted from the legislative history previously mentioned and stated (257 F. 2d 215):

> "The Board has heretofore taken the position that it, the Board, 'is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific performance of its terms.' • • •
>
> "In the face of the legislative history just recited, it would seem that the Board has a heavy burden of persuasion that it does have authority to treat a violation of a term of a collective bargaining contract, even a term providing for the settlement of grievance by arbitration, as an unfair labor practice, and, in effect, decree its specific performance. It will be remembered that the rejected Senate provision expressly named

agreements to submit labor disputes to arbitration as unfair labor practices.

* * * * *

"The Board says, rightly, that a strike in violation of an agreement not to strike is an unprotected labor activity. The Supreme Court of the United States so held long before there was any legal provision for unfair labor practices by Unions, NLRB v. Sands Mfg. Co., 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682. The Board has frequently so held. See, e.g., W. L. Mead, Inc., 113 NLRB 1040. Employees who strike in violation of such an agreement may be discharged, with impunity. However, to translate their conduct from an unprotected activity to an unfair labor practice one must find justification in the statute."

On June 20, 1958, the same Court set aside the Board's decision in the *Westmoreland Coal Company* case, *supra*. *Local Union No. 9735, U.M.W. v. NLRB*, 258 F. 2d 146. In this case the Board had reasoned that Section 8(d) of the Act required the union to file a sixty-day notice prior to striking where the contract provided for interim bargaining over such questions as seniority and provided for arbitration if the parties could not agree. The Court of Appeals stated (258 F. 2d 149):

"Section 8(d) requires the retention of 'all the terms and conditions' of an existing contract 'without resorting to strike or lock-out' for a period of sixty days after notice to terminate or modify the contract is given. 'Section 8(d) thus seeks, *during this natural renegotiation period*, to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation.' Mastro Plastics Corp. v. NLRB, 350 U. S. 270, 286, 76 S. Ct. 349, 359, 100 L. Ed. 309. Section 8(d) does not apply, however, where the attempt is not to modify the terms of an agreement, * * *

but is to obtain an objective which the agreement has not settled. NLRB v. Jacobs Mfg. Co., 2 Cir., 196 F. 2d 680, 683-84." (Emphasis supplied)

The *Boone County* and *Westmoreland* decisions of the Board are closely examined in Cox, "The Duty to Bargain in Good Faith", 71 Harv. L. Rev. 1401, 1437-38, where the author states:

"• • • Even in 1947 Congress was sensitive to the difficulties inherent in efforts to regulate labor's resort to economic weapons. Proposed restrictions upon freedom to strike and picket were sharply debated both in committee and on the floor. Those which were approved were written in section 8(b)(4) in fairly specific language. *Neither slow-downs nor strikes in breach of contract were prohibited.* Section 13 provides that nothing in the act, 'except as specifically provided for herein,' shall be construed to diminish 'the right to strike.' Section 501 of the Labor Management Relations Act, which includes the amended NLRA, defines 'strike' to include 'any concerted slow-down or other concerted interruption of operations by employees.' The Board simply disregarded the implications of these provisions in reading a moral judgment into the amorphous duty to bargain collectively.

"The *Boone County* case illustrates still another danger. The legal system includes a diversity of tribunals each with prescribed functions. *The NLRB has not been assigned the task of policing all unlawful conduct which occurs in the context of a bargaining relation. The Senate bill which emerged from conference as the Taft-Hartley Act would have made it an unfair labor practice 'to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration.* • • • *This provision was deleted by the conference committee on the ground that the enforcement of labor contracts should be left to*

the courts. Since there is nothing in the *Boone County* case distinguishing the UMW's resort to a strike instead of arbitration from any other strike which violates a promise to arbitrate, the decision makes a union unfair labor practice out of conduct which the Congress decided should not be policed by the NLRB. * * *" (Emphasis supplied)

For further evidence of the fact that the National Labor Relations Board is not the proper forum to decide breach of contract questions, but that such issues are to be decided by the courts; see the following decisions which state that courts have jurisdiction over breach of contract issues *even though* the same conduct may also constitute an unfair labor practice which, as such, is solely within the jurisdiction of the Board: *Reed v. Fawick Airflex Co.*, 86 F. Supp. 822, 823-824 (N. D. Ohio, E. D.); *Textile Workers Union of America v. Arista Mills Co.*, 193 F. 2d 529, 533-534 (4th Cir.); *Lodge No. 12, District No. 37, I.A.M. v. Cameron Iron Works, Inc.*, 257 F. 2d 467 (5th Cir.), *cert. den.* — U. S. —, 79 S. Ct. 120, 3 L. Ed. 2d 110; *United Electrical, R. & M. Workers v. Worthington Corp.*, 236 F. 2d 364 (1st Cir.); *Independent Petroleum Workers v. Esso Standard Oil Co.*, 235 F. 2d 401 (3rd Cir.); *Plumbers & Steamfitters Union, Local No. 598 v. Dillion*, 255 F. 2d 820, 823 (9th Cir.); *Local 19, Warehouse, Etc. v. Buckeye Cotton Oil Co.*, 236 F. 2d 776, 783 (6th Cir.); Note, Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice, 69 Harv. L. Rev. 725, 727-728; Dunau, "Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems," 57 Col. L. Rev. 52.

To repeat, the union admits no federal unfair labor practices. It does not contend, as unions have sometimes

contended, that it has refused to bargain in violation of Section 8(b)(3) of the Act. In fact, just to the contrary, the union's contention is that it has demanded to bargain and is ready and willing to bargain. It is the respondent which has refused to bargain and respondent justifies that refusal upon the provisions of its contract and upon the express language of Section 8(d) of the Act, which states:

> "The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *"

See also *United Elastic Corp.*, 84 NLRB 768.

It is of passing interest to note that the Regional Director of the National Labor Relations Board has dismissed this union's charge that respondent has refused to bargain in violation of Section 8(a)(5) of the Act. See Appendix B, page 29, 30, *infra*. This union's appeal from that decision was also dismissed. See Appendix C, page 31, *infra*. Respondent assumes that this Court will take judicial notice of the determinations of the Board insofar as such decisions relate to allegations contained in the union's petition herein.

It is now well established that the provisions of Section 8(d) are applicable only when a contract has been reopened for modification or terminated for renegotiation. *NLRB v. Lion Oil Co.*, 352 U. S. 282, 77 S. Ct. 330, 1 L. Ed. 2d 331. In that case, this Court quoted the provision of Section 8(d) cited immediately above and relied on by respondent, and stated (352 U. S. 290, 77 S. Ct. 335):

"The negative implication seems clear: Congress recognized a duty to bargain over modifications *when the contract itself contemplates such bargaining* * * *." (Emphasis supplied)

Section 8(d) of the National Labor Relations Act is simply a corollary of the unfair labor practices defined in Section 8(a)(5) and Section 8(b)(3), which impose upon employers and unions a duty to bargain. Section 8(d) defines the duty to bargain and prescribes certain procedures which must be followed in order to carry out that duty in good faith. The failure to comply with these procedures may properly be described as unfair practices in connection with the duty to bargain. On the other hand, Section 8(d) specifically provides, in reference to attempts by one party to modify a fixed term contract before its expiration date, that there is no duty to bargain during the unexpired term of such contract, and specifically provides that concerted activity (strikes and picketing) during such time is not protected. The fact that such activities are not protected, however, does not make them unfair labor practices nor impose the penalities for unfair labor practices upon those conducting the activity, since the bargaining procedures are not then applicable.

On page 10 of its petition the union states that this Court has also "recognized the intent of Congress to enforce no-strike provisions by providing a federal forum and a federal substantive law for the enforcement of agreements to arbitrate" under Section 301 of the Act. *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U. S. 448 77 S. Ct. 912, 1 L. Ed. 2d 972, is cited in support of this proposition.

But *Lincoln Mills* did not preempt state courts from granting relief to a party injured by a breach of a collective bargaining contract; that case held that Section 301 of the Act gives federal district courts power to decree specific performance of collectively bargained agreements to arbitrate and furnishes a body of federal substantive law for the courts to apply in enforcing such agreements.

To interpret the *Lincoln Mills* decision as holding that Section 301 preempts state courts from granting injunctive relief against a union which willfully violates a no-strike clause in its contract would be to grant unions the very immunity from contractual responsibility which Section 301 was designed to cure. It is one thing to bring an action under Section 301 in the federal courts to obtain specific enforcement of an agreement to arbitrate when one party refuses to do so. It is a completely different matter, however, when a union with a potential grievance utterly fails to utilize the grievance and arbitration machinery, as it agreed by contract to do, and strikes the employer instead. In the instant case, respondent was never even *requested* to arbitrate; in *Lincoln Mills*, the employer *refused* to arbitrate after the union requested it to do so pursuant to its contractual agreement.

The union's concern for uniformity in labor disputes is really based on the knowledge that under Section 301 an injunction will not lie to restrain a breach of a no-strike clause because the Norris-LaGuardia Act prevents the federal courts from granting such relief. See *A. H. Bull Steamship Co. v. Seafarers' International Union*, 250 F. 2d 326 (2nd Cir.), *cert. den.* 355 U. S. 932; *Alcoa Steamship Co. v. McMahon*, 173 F. 2d 567 (2nd Cir.), *cert. den.* 338 U. S. 821; *W. L. Mead, Inc. v. Teamsters Local* 25, 217 F. 2d 6

(1st Cir.); *Local* 205 *U.E. v. General Electric Co.*, 233 F. 2d 85 (1st Cir.), affirmed 353 U. S. 547.

On the question of concurrent jurisdiction and especially the matter of a difference in remedies in breach of contract cases, see *McCarroll v. Los Angeles County District Council of Carpenters*, 49 Cal. 2d 45, 315 Pac. 2d 322, *cert. den.* 355 U. S. 932, 78 S. Ct. 413, 2 L. Ed. 2d 415. This Court observed in the second *Garmon* case, *supra*, that "• • • judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, *rather than on the method of regulation adopted.* • • •" 3 L. Ed. 2d 782.

Indeed, numerous cases have held that Section 301 does not preempt state court jurisdiction in breach of contract cases and state courts may grant injunctive relief for such contract violations. See *McCarroll v. Los Angeles County District Council of Carpenters*, 49 Cal. 2d 45, 315 Pac. 2d 322, *cert. den.* 355 U. S. 932, 78 S.Ct. 413, 2 L.Ed. 2d 415; *General Building Contractors' Assn. v. Local Union No.* 542, 370 Pa. 73, 87 Atl. 2d 250, 32 A.L.R. 2d 822; *General Electric Co. v. Int'l Union, U.A.W.*, 93 Ohio App. 139, 108 N. E. 2d 211, *appeal dismissed* 110 N. E. 2d 424; *Philadelphia Marine Trade Assn. v. International Longshoremens' Local Union No.* 1291, 382 Pa. 326, 115 Atl. 2d 733, *cert. den.* 350 U. S. 843, 76 S. Ct. 84, 100 L. Ed. 751; *Anchor Motor Freight v. Local* 445, *I.B.T.*, 171 N. Y. S. 2d 506, affirmed 5 App. Div. 2d 869. Note also *Associated Tel. Co. v. Communication Workers of America, C.I.O.*, 114 F. Supp. 334, 341 (S. D. Cal.) and *Castle & Cooke Terminals v. Local* 137 *I.L.W.*, 110 F. Supp. 247, 250 (D. C. Hawaii).

Additional Reasons for Denying the Petition

As a further reason why this Court should not grant the union's petition herein, respondent cites Article V, paragraph No. 4, of its complaint (T. 3) as indicating that unlawful threats of reprisal are involved in this case. (T. 118-143) Notwithstanding the precise holding of the Minnesota Supreme Court, the concurring opinions of Justices Gallagher and Murphy, 94 N. W. 2d at 526-527, indicate that there were other issues involved in the case below which might very well govern the State Court's determination that it had jurisdiction. See International Assn. of Machinists v. Gonzales, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018.

Furthermore, as far as the parties to this controversy are concerned it would appear that the injury caused by the breach will become moot, because the contract by its terms expires on June 30, 1959.

Furthermore, in Article V, paragraph No. 5 of its complaint below (T. 4), respondent invoked Minnesota Statutes 1957, Sec. 179.11(4), which states in effect that it is a state unfair labor practice for a majority of pickets not to be employees of the employer being picketed. This issue of "stranger picketing" would require decision by the trial court upon remand to it for a determination on the merits. See *International Brotherhood of Teamsters, Local 695, A. F. L. v. Vogt, Inc.*, 354 U. S. 289, 77 S. Ct. 1166, 1 L. Ed. 2d 1347, *reh. den.* 354 U. S. 945, 77 S. Ct. 1423, 1 L. Ed. 2d 1558; *Dougherty v. Commonwealth*, 106 S. E. 2d 754 (Va. 1957).

CONCLUSION

The union has stated that it sees "no reason why" the National Labor Relations Act should not regulate conduct which involves violations of no-strike provisions in a collective bargaining contract (Petition, p. 12). Respondent submits that the authorities discussed above conclusively establish the reason why the rule is different from that urged by the union. To repeat, in view of the clear determination of the National Labor Relations Board that the union conduct here involved is neither protected nor prohibited, and in view of the "compelling precedent" of the foregoing authorities, the Minnesota Supreme Court was correct in granting a writ of mandamus commanding the trial court to take jurisdiction of this controversy and to determine it on the merits. *San Diego Building Trades Council v. Garmon*, — U. S. —, 79 S. Ct. 773, 780, 3 L. Ed. 20 775, 784.

Respondent therefore prays that this Court deny the Union's Petition.

Respectfully submitted,

RONALD S. HAZEL
425 Hamm Building
St. Paul 2, Minnesota
Counsel for Respondent

Of Counsel
MANDT TORRISON and
JAMES C. O'NEILL
425 Hamm Building
St. Paul 2, Minnesota

APPENDIX A

United States Statutes

The pertinent provisions of the National Labor Relations Act, as amended, are as follows:

1. 61 Stat. 140, 29 U.S.C. Section 157, Section 7 of the Act.

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

2. 61 Stat. 140, 29 U.S.C. Section 158(b)(3), Section 8(b)(3) of the Act.

> "Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> "(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);"

3. 61 Stat. 140, 29 U. S. C. Section 158(d), Section 8(d) of the Act.

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agree-

ment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

* * * * *

(4) continues in full force and effect without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall * * * not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer."

4. 61 Stat. 151, 29 U.S.C. Section 163, Section 13 of the Act.

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

5. 61 Stat. 156, 29 U.S.C. Section 185(a), Section 301 (a) of the Act.

"Sec. 301.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

NATIONAL LABOR RELATIONS BOARD
EIGHTEENTH REGION
601 Metropolitan Building
Minneapolis 1, Minnesota

February 19, 1959

International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers
of America, Local 993
320 University Avenue
St. Paul, Minnesota

Re: McLEAN DISTRIBUTING COMPANY, INC.
Case No. 18-CA-1016

Gentlemen:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that, because there is insufficient evidence of violation, further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19), you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,
C. EDWARD KNAPP
Regional Director

Certified Mail, R R R
Cc: See Page 2

McLEAN DISTRIBUTING COMPANY, INC., 18-CA-1016
2-19-59

Cc: Robins, Davis & Lyons
Attorneys at Law
1130 Minnesota Building
St. Paul 1, Minnesota
Attention: Mr. Erwin A. Peterson
Attorney

McLean Distributing Company, Inc.
190 Chestnut Street
St. Paul 2, Minnesota

Bundlie, Kelley and Maun
Attorneys at Law
425 Hamm Building
St. Paul 2, Minnesota
Attention: Mr. Mandt Torrison
Attorney

General Counsel
National Labor Relations Board
Washington 25, D. C.

erb

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington 25, D. C. April 22, 1959

Erwin A. Peterson, Esquire
Robins, Davis & Lyons
1130 Minnesota Building
St. Paul 1, Minnesota

Re: McLean Distributing Company, Inc.
Case No. 18-CA-1016

Dear Mr. Peterson:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations of Section 8 (a) (1), (3) and (5) of the National Labor Relations Act, has been duly considered by the General Counsel.

The General Counsel sustains the ruling of the Regional Director. Like the Director, the General Counsel concludes that there is insufficient evidence of violations to warrant further proceedings.

Very truly yours,
THOMAS J. RYAN
Special Assistant to the
General Counsel

cc: Director, 18th Region
Intl. Bro. of Teamsters et al, Local 993, 320 University Avenue, St. Paul, Minnesota.
McLean Distributing Co., Inc., 190 Chestnut St., St. Paul, Minnesota.
Bundlie, Kelley and Maun, 425 Hamm Building, St. Paul 2, Minnesota,
Attn: Mr. Mandt Torrison, Esq.
CERTIFIED MAIL